IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.2191 OF 1984
AND
SPECIAL CIVIL APPLICATION No.2207 OF 1984

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

S.L.VAGHELA,
Versus
DIST. DEVELOPMENT OFFICER, ZILLA PANCHAYAT, KHEDA

Appearance:
In Spl.C.Appln. No.2191/84:

MR NK MAJMUDAR for Petitioner
Mr NIGAM SHUKLA for Respondent No.6 & 7
None present for other Respondents

In Spl.C.Appln. No.2207/84:

MR NK MAJMUDAR for Petitioner
Mr NIGAM SHUKLA for Respondent

CORAM : MR.JUSTICE S.K.KESHOTE
Date of decision: 06/08/96

ORAL JUDGMENT

As both the writ petitions are based on identical facts and have been filed by the common petitioner and arisen out of a common judgment of the Tribunal, the same are being disposed of by this common Judgment.

2. Heard learned counsel for the parties.

Re.: Special Civil Appln. No.2191 of 1984.

3. Challenge has been made by the petitioner in this Special Civil Application to the order dated 17th December 1983, made by the Gujarat Civil Services Tribunal in Appeal No.331 of 1981. Under this appeal, the petitioner has challenged the order of the District Development Officer dated 9.4.81, under which the petitioner was transferred and posted as Senior Clerk. Challenge has been made to the order dated 9.4.81 before the Tribunal by the petitioner on the ground that the petitioner was senior to respondents No.2 to 5 in the entry of junior clerk and as such he should have been continued as Aval Karkoon and should not have been transferred and posted as Senior Clerk. The respondents No.2 to 5 were ordered to be continued on the post of Aval Karkoon and the petitioner, under the impugned order aforesaid, has been posted on transfer as a Senior Clerk.

4. The learned counsel for the petitioner contended that though the respondents No.2 to 5 have been appointed on the post of Junior Clerk earlier to the petitioner, but the enlistment date of the officiation of these persons on the post of Junior Clerk should not have been taken into consideration for their inter-se seniority. Same contention has been made by the learned counsel for the petitioner before the Tribunal and the same has not been accepted. The Tribunal has given out the reasons that the seniority in the cadre of Junior Clerks has been correctly given to the respondents above the petitioner. Seniority has been given from the date of enlistment of these three persons on the post of Junior Clerk. In para-3 of the Judgment, the Tribunal has given out the details of appointments of the petitioner and the respondents. I find therefrom that the respondents No.2 to 4 have been appointed as Junior Clerks on 26th December 1957, 22nd November 1958 and 15th February 1957 respectively, much earlier to the petitioner who has been appointed on the said post on 1st April 1960. Much emphasis has been laid by the learned counsel for the petitioner on the Resolution of the Government dated 7.8.73, by contending that as per the aforesaid Resolution, the employees of the Revenue Department who were allocated to the Panchayat, their pre enlistment

services was not to be counted for seniority. In para-5 of the said Resolution, it has been specified that the pre enlistment service of the persons concerned shall not be allowed to count for seniority, but the Tribunal has observed that in earlier decisions the view has been taken that the aforesaid order contained in the Resolution (G.R.) dated 7.8.73 do not effect the seniority of Revenue Department clerks allocated to the Panchayat. It has further been observed by the Tribunal that the orders of clarifications sought to be made in G.R. dated 7.8.73 that the provisions contained therein apply particularly in respect of the seniority only to those who remain in Revenue Department and not to those who were allocated to the Panchayat from 1.4.63. Taking into consideration the aforesaid facts, the Tribunal has concluded that pre enlistment service being not counted for seniority emerging in G.R. dated 7.8.73 applies only to the employees of Revenue Department and not to those employees of Revenue Department who have been allocated and absorbed in the Panchayat service. The learned counsel for the petitioner does not dispute that the petitioner and the respondents herein have been allocated to Panchayat as junior clerks on 23.9.66 but effective from 1.4.63. The learned counsel for the petitioner is unable to successfully challenge the assignment of seniority to the private respondents above him. Yet there is another fact which has to be noticed. Earlier to the recommendation of the Second Pay Commission, the pay scales for the post of Senior Clerk, Aval Karkoon and Accounts Clerks were equivalent. Only after the Second Pay Commission's recommendations, the pay scale for the post of Aval Karkoons and Accounts Clerks were made higher than that of Senior Clerks. In the ignorance of the aforesaid facts, the petitioner has been given posting to the post of Aval Karkoon or Accounts Clerk by transfer, but merely on that ground, the petitioner will not acquire any right to continue on the higher post. It is not the case of the petitioner that he was given regular promotion on the post carrying the higher pay scale. Regular promotion was given to the petitioner on the post of Deputy Chitnis on 17.10.81 and not earlier. At the most it can be said to be a case where the petitioner has continued to work on higher post rather on temporary basis because of the facts stated aforesaid. Here a question arises that by merely continuing to work on a post on adhoc temporary basis, whether the petitioner acquires any right to continue on the said post. A reference in this respect may have to the decision of the Supreme Court in the case of M.P.H.S.V.N. v. Devendrakumar reported in 1995 JT SC 198 where it has been held that a temporary Government servant does not

become permanent unless he acquires that capacity by force any Rule or is declared as permanent servant. It is not the case of the petitioner that he acquired the status of permanent employment on the higher post of Aval Karkoon or Accounts Clerk nor it is the case of the petitioner before this Court as well as the Tribunal that by force of some Rule, he has been declared as permanent servant. A reference may also have to another decision of Supreme Court in the case of State of Orissa & Anr. v. Dr. Prari Mohan Misra, reported in JT 1995(2) SC 54, which was a case of reversion of adhoc promotee. The Supreme Court has held that the adhoc promotee has no right to hold the post. Taking into consideration the facts of the case as well as the ratio of the decision of the Hon'ble Supreme Court in the aforesaid two cases, I do not find any illegality in the order of reversion of the petitioner made by the respondent District Panchayat as well as in the order of the Tribunal confirming that order.

5. In the result, the Special Civil Application No.2191 of 1984 fails and the same is dismissed. Rule is discharged.

Re.: Spl. Civil Appln. No.2207 of 1984.

6. The facts of this case in details need not be taken out for the reason that in this Special Civil Application, the petitioner is challenging the order of the service Tribunal passed in Appeal No.147 of 1982 which has been decided under the same order which was challenged by the petitioner in Special Civil Application No.2191 of 1984. In appeal No.147 of 1982, the petitioner has challenged the order of the District Development Officer concerned, Jilla Panchayat, dated 16.11.81, under which the petitioner has been appointed as a Junior Clerk on reversion. An endorsement has been made thereon that the petitioner has been reverted to the post carrying pay scale of 330-560 and recovery should be effected from him in the event of payment to him in the scale of 425-800 i.e. in the scale of Aval Karkoon. Thus, in substance, in the appeal No.147 of 1982, and in this Special Civil Application, grievance is made by the petitioner against the action of the respondents to order for recovery of the amount in the event of payment to him in the pay scale of 425-800, which is consequential order to the order of reversion. In the Special Civil Application No.2191 of 1984, the subject matter of challenge was the order of reversion and it has already been held that the said order was perfectly legal and justified. Validity of this consequential order of

reversion has to be now gone into. The contention of the learned counsel for the petitioner is that the reversion may be justified but the order for recovery of difference as to payment in the higher pay scale than the lower pay scale is illegal, unwarranted, unjustified and arbitrary.

7. The learned counsel for the respondent, on the other hand contended that when the petitioner has wrongly been placed on a higher post and his reversion to the lower post has been held to be valid by this Court by rejecting another petition of the petitioner, then recovery was only consequential and it cannot be interfered with. It has next been contended that the Tribunal has also not interfered with this order and that judgment does not call for any interference by this Court.

8. I have given my thoughtful consideration to the submissions made by learned counsel for the parties. The Tribunal, while rejecting the appeal No.147 of 1982, of the petitioner, has altogether ignored an important fact that the petitioner has been paid the salary for the post on which he worked under the orders of the respondent. It is true that the respondent, under its ignorance of the fact that all the three posts of Senior Clerk, Aval Karkoon and Accounts Clerk are carrying the same pay scale, posted the petitioner on a higher post and paid him the pay scale of the higher post, but that was the mistake or error on the part of the respondent, for which the petitioner cannot be put to suffer. It is not a case where the petitioner, by committing some fraud or by some collusion with some officers or some under hand dealings, got his posting on the post carrying higher pay scale. The respondents have given him the posting on the higher post and as such, whatever wages were paid to him in the said higher pay scale are paid to him for work done and as such, there is no justification on the part of the respondents to order for recovery of the same.

9. The matter has to be considered from another angle. The respondent has taken work from the petitioner on the higher post and on the principle of `equal pay for equal work', the petitioner is also entitled for the pay in the pay scale of the higher post. This aspect has not been considered by the Tribunal and it has proceeded only on the ground that the order of posting of the petitioner on higher post was illegal. It may be. But the Court cannot be oblivious of the fact that under the order of respondent, the petitioner has worked on the higher post. In case the order of recovery of the amount is ordered to be maintained, then it will tantamount to give premium to

the respondents for its own error and mistake. Recovery should have been made only where the petitioner would have been in any way instrumentality in getting the favourable order in his favour, which is not the case. A reference may have to be to the decision of the Supreme Court in the case of State of Bihar v. Narasimha Sundaram, reported in AIR 1994 SC 599. That was a case where an employee, suppressing the correct age, continued in service beyond superannuation period. The department has refused to pay the salary to the employee for the period beyond the age of superannuation. The Supreme Court held that the action of the department, refusing to pay the salary for this period is not justified. It could have been done only after holding an inquiry wherein it is found that the employee is the person who is instrumental in suppressing the correct age. A reference may have to another decision of Supreme Court in the case of Shyambabu & ors. v. Union of India, reported in 1994 (2) SCC 521. In this case the higher pay scale was erroneously given to the petitioners therein since 1973. The question before the Court was whether the recovery of the amount of difference in two pay scales can be made from the petitioners therein ?. The Supreme Court though held that the petitioners therein were entitled only to the pay scale of 330-480 in terms of recommendation of the Pay Commission with effect from 1.1.73 and only after a period of 10 years they became entitled to pay scale of 330-560, but as they have received the scale of 330-560 since 1973 but no fault of theirs, it shall only be just and proper not to recover any excess amount which has already been paid to them. Accordingly, direction was issued by Supreme Court in the case that no steps should be taken to recover or to adjust any excess amount paid to the petitioners therein due to fault of respondents. The petitioners being in no way responsible for the same. The matter in question is squarely covered by the decision of Supreme Court in the case of Shyambabu v. Union of India (Supra). In the present case also, the petitioner was given post in the higher pay scale by the respondent without any fault on his part. The respondent cannot be allowed to take benefit for its own fault and error. In the result, this Special Civil Application is allowed and the order of respondents dated 16.11.1981 to the extent where it directs to recover excess amount, if any, paid to the petitioner in the pay scale of 425-800, is set aside. The consequence of setting aside of the order dated 16.11.81 of the respondent, is that the judgment given by the Service Tribunal in appeal No.147/82 also stands quashed and set aside. In this case interim relief was not granted by this Court and there may be a possibility,

though none of the counsel for parties have brought on record any material, that in the meanwhile the excess amount paid to the petitioner in the higher pay scale would have been recovered. It is made clear that in case this amount has been recovered in pursuance of the order of the respondent and that of the Tribunal, the same shall be refunded to the petitioner forthwith. Rule is made absolute in aforesaid terms with no order as to costs.

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(sunil)